

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs November 7, 2008

**HAROLD V. SMITH v.  
TENNESSEE DEPARTMENT OF CORRECTION, ET AL.**

**Appeal from the Chancery Court for Johnson County  
No. 6054 G. Richard Johnson, Chancellor**

---

**No. E2008-01153-COA-R3-CV - FILED NOVEMBER 14, 2008**

---

Harold V. Smith ("Petitioner") is a prisoner at the correctional facility in Pikeville, Tennessee. During a search of Petitioner's cell, Correctional Officer Jeremy McCracken found a pill concealed inside a sugar packet in Petitioner's pants. The pill was identified later as a morphine pill. Following an administrative hearing, Petitioner was found guilty of possessing an illegal drug. Both of Petitioner's administrative appeals were unsuccessful. Thereafter, Petitioner filed a petition for common law writ of certiorari against the Department of Correction and Warden Howard Carlton. The Trial Court granted the writ after the defendants filed a response stating they did not oppose issuance of the writ. The defendants then filed a motion for judgment on the pleadings, which the Trial Court granted. Petitioner appeals claiming there were various errors at the initial hearing which he claims mandate a dismissal of the charges against him. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Harold V. Smith, pro se Appellant.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael Moore, Solicitor General, and Jennifer Brenner, Assistant Attorney General, Nashville, Tennessee, for the Appellees, Tennessee Department of Correction and Warden Howard Carlton.

**OPINION**

## **Background**

Petitioner is incarcerated at the Southeastern Tennessee State Regional Correctional Facility in Pikeville, Tennessee. On June 7, 2007, a morphine pill allegedly was found in Petitioner's pants. According to an incident report prepared by Corrections Officer Jeremy McCracken ("Officer McCracken"):

On the above date and approximate time I ... was searching Unit 11 Cell 38 when I did find in inmate ... [Smith's] pants 1 30 mg morphine pill. Therefore based on the above information inmate Smith is being charged with drug possession.

A disciplinary hearing was conducted on June 18, 2007, after which Petitioner was found guilty of possession of a drug. Petitioner was sentenced to two days segregation and thirty days probation. Petitioner was fined \$4, his visitation privileges were suspended for six months, and his package privileges were suspended for nine months. Petitioner appealed the initial decision on the following basis: (1) there was insufficient or conflicting evidence as to what the pill was (i.e., morphine or something else); (2) Petitioner had a right to view the evidence against him but a photograph of the pill that was entered into evidence was so bad no one could tell what it was; and (3) Petitioner was not guilty and if an illegal drug was found in his pants, he was framed. On the first appeal to Warden Howard Carlton, the Warden concurred with the initial decision and finding of guilt. Petitioner then appealed the decision of the Warden to a Commissioner, who likewise affirmed the initial finding.

In September of 2007, after having exhausted his administrative appeals, Petitioner filed a petition for common law writ of certiorari seeking review of the Commissioner's decision. The State did not oppose the issuance of the writ and, accordingly, the petition was granted by the Trial Court. The issues then before the Trial Court were: (1) whether Petitioner was denied the opportunity to cross-examine Sgt. Julian and a clinic worker; (2) whether Petitioner was denied the right to view evidence presented against him; (3) whether Sgt. Shepherd, the chairman of the disciplinary board and the hearing officer, should have recused himself; (4) whether the finding of guilt was supported by the evidence; and (5) whether the record before the Trial Court was incomplete because the photograph of the pill introduced at the hearing was not included in the record.

The State filed a motion for judgment on the record. The State argued that the administrative record established that Petitioner was afforded a fair hearing. The Trial Court agreed and granted the motion. The Trial Court found and held that Sgt. Shepherd did not exceed his jurisdiction, or act illegally, fraudulently, or arbitrarily. The Trial Court further concluded that Sgt. Shepherd did not deviate from the uniform disciplinary procedures "in any manner that effectively denied [Petitioner] a fair disciplinary hearing".

Petitioner appeals raising the following issues, which we quote:

- A. Whether the Chancery Court erred in holding that the [Petitioner] was not denied the opportunity to cross-examine any witness.
- B. Whether the Chancery Court erred in holding that the [Petitioner] was not denied the right to view evidence.
- C. Whether the Chancery Court erred in holding that Sgt. Joseph Shepherd was not required to recuse himself.
- D. Whether the Chancery Court erred in holding that there was sufficient proof to support a finding of guilt by the preponderance of the evidence.
- E. Whether the Chancery Court erred in holding that the record filed in this case was not incomplete ....

### **Discussion**

The standard of review applicable to this appeal was set forth recently by this Court in *Ross v. Tenn. Dep't of Correction*, No. W2008-00422-COA-R3-CV, 2008 WL 4756873 (Tenn. Ct. App. Oct. 30, 2008)<sup>1</sup> wherein we stated:

“The common-law writ of certiorari serves as the proper procedural vehicle through which prisoners may seek review of decisions by prison disciplinary boards, parole eligibility review boards, and other similar administrative tribunals.” *Jackson v. Tenn. Dep't of Corr.*, No. W2005-02240-COA-R3-CV, 2006 WL 1547859, at \*3 (Tenn. Ct. App. June 8, 2006)(citing *Rhoden v. State Dep't of Corr.*, 984 S.W.2d 955, 956 (Tenn. Ct. App. 1988)). The issuance of a writ of common-law certiorari is not an adjudication of anything. *Keen v. Tenn. Dep't of Corr.*, No. M2007-00632-COA-R3-CV, 2008 WL 539059, at \*2 (Tenn. Ct. App. Feb. 25, 2008)(citing *Gore v. Tenn. Dep't of Corr.*, 132 S.W.3d 369, 375 (Tenn. Ct. App. 2003)). Instead, it is “simply an order to the lower tribunal to file the complete record of its proceedings so the trial court can determine whether the petitioner is entitled to relief.” *Id.* (citing *Hawkins v. Tenn. Dep't of Corr.*, 127 S.W.3d 749, 757 (Tenn. Ct. App. 2002); *Hall v. McLesky*, 83 S.W.3d 752, 757 (Tenn. Ct. App. 2001)). “Review under a writ of certiorari is limited to whether the inferior board or tribunal exceeded its jurisdiction or acted illegally,

---

<sup>1</sup> The time period for filing a Tenn. R. App. P. 11 request for permission to appeal to the Tennessee Supreme Court has not yet expired in *Ross*.

arbitrarily, or fraudulently.” *Jackson*, 2006 WL 1547859, at \*3 (citing *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990)). “The reviewing court is not empowered ‘to inquire into the intrinsic correctness of the board’s decision.’” *Gordon v. Tenn. Dep’t of Corr.*, No. M2006-01273-COA-R3-CV, 2007 WL 2200277, at \*2 (Tenn. Ct. App. July 30, 2007)(quoting *Willis v. Tenn. Dep’t of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003)). Our Supreme Court has held that a common-law writ of certiorari may be used to remedy: “(1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal’s authority; and (5) plain and palpable abuses of discretion.” *Gordon*, 2007 WL 2200277, at \*2 (citing *Willis*, 113 S.W.3d at 712). The reviewing court does not weigh the evidence, but must uphold the lower tribunal’s decision if the lower tribunal “acted within its jurisdiction, did not act illegally or arbitrarily or fraudulently, and if there is any material evidence to support the [tribunal’s] findings.” *Jackson*, 2006 WL 1547859, at \*3 (citing *Watts v. Civil Serv. Bd. of Columbia*, 606 S.W.2d 274, 276-77 (Tenn. 1980); *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983)). “A board’s determination is arbitrary and void if it is unsupported by any material evidence.” *Gordon*, 2007 WL 2200277, at \*2 (citing *Watts*, 606 S.W.2d 274, 276-77 (Tenn. 1980)). Whether there existed material evidence to support the board’s decision is a question of law which should be determined by the reviewing court based on the evidence submitted. *Id.* (citing *Watts*, 606 S.W.2d at 277).

This Court must review a trial court’s conclusions of matters of law *de novo* with no presumption of correctness. *Gordon*, 2007 WL 2200277, at \*2 (citing Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000)). Because our review of the board’s determination “is no broader or more comprehensive than that of the trial court with respect to evidence presented before the [b]oard[.]” *Id.* (citing *Watts*, 606 S.W.2d at 277), this Court “will not ‘inquire into the intrinsic correctness of the [b]oard’s decision,’ but will uphold the decision if it was reached lawfully and in a constitutional manner.” *Id.* (quoting *Hopkins v. Tenn. Bd. of Paroles and Prob.*, 60 S.W.3d 79, 82 (Tenn. Ct. App. 2001)).

*Ross*, 2008 WL 4756873, at \*2, 3.

“A prisoner seeking judicial review of a prison disciplinary proceeding states a claim for relief under common-law writ of certiorari if the prisoner’s complaint alleges facts demonstrating that the disciplinary board failed to follow the Uniform Disciplinary Procedures and this failure *substantially prejudiced* the petitioner.” *Willis v. Tenn. Dep’t of Correction*, 113 S.W.3d 706, 713

(Tenn. 2003)(emphasis added). However, minor deviations do not require dismissal of the offense if the inmate received a fair hearing. *See Jeffries v. Tenn. Dep't of Correction*, 108 S.W.3d 862, 873 (Tenn. Ct. App. 2002)(“Tenn. Dep’t Corr. Policy No. 502.01(V) itself provides that ‘minor deviations’ from the procedures that do not prejudice the prisoner do not require dismissal of the disciplinary offense. To trigger judicial relief, a departure from the Uniform Disciplinary Procedures must effectively deny the prisoner a fair hearing.”).

At the administrative hearing, Officer McCracken testified that he searched Petitioner’s cell and that he found a pill inside a sugar packet in Petitioner’s pants. Officer McCracken then used a medical book to identify the pill. Officer McCracken testified that, according to the book, the pill was a 30 mg. morphine pill. The book belonged to Sgt. Julian. Petitioner claims that during the hearing conducted by Sgt. Shepherd, Sgt. Shepherd contacted an unknown person in the medical clinic. Petitioner claims he was denied the right to cross-examine this unknown person, and because the medical book belonged to Sgt. Julian, Petitioner had the right to cross-examine him as well.

The record on appeal does not support the allegation that Sgt. Shepherd contacted anyone in the medical clinic during the hearing. In any event, the record shows that neither this unknown clinic worker nor Sgt. Julian testified at the hearing. Because neither of these people testified at the hearing, Petitioner cannot claim that he was denied the right to cross-examine them. Even if the record supported the allegation that these two people made statements, which it does not, the record establishes that the only proof relied upon when finding Petitioner guilty was the testimony of Officer McCracken.

Petitioner claims in his second issue that because the photograph of the pill that was introduced into evidence was so poor, he was denied his right to “view” evidence against him in violation of applicable TDOC Policy. We disagree. Whether the photograph was of good quality goes to the weight of the evidence. Petitioner obviously was allowed to “view” the photograph as, otherwise, he would not be able to attack its quality. Since Petitioner clearly was allowed to “view” the evidence, and the quality of the photograph goes only to the weight of that evidence, we must reject Petitioner’s claim on this issue.

Petitioner’s third issue is his claim that Sgt. Joseph Shepherd, the hearing officer, should have recused himself. When rejecting this argument, the Trial Court stated, *inter alia*:

[Petitioner alleges] that Sgt. Shepherd was required to recuse himself because, by soliciting information from Sgt. Julian and the [unknown] clinic worker concerning the toxicology of the pill, he participated in the investigation. In order to ensure impartiality, TDOC Policy #502.01(VI)(A)(2) prohibits an employee who participated in the investigation of a disciplinary charge from sitting on an inmate disciplinary board or presiding over a disciplinary hearing....

As previously  
stated, the record does  
n o t   s u p p o r t

[ P e t i t i o n e r ' s ]  
allegation that Sgt.  
Shepherd solicited  
testimony from a clinic  
worker and Sgt.  
Julian....

We agree with the above conclusion as well as the Trial Court's later conclusion that the "investigation" was well over by the time of the hearing. As we stated previously, the record in no way supports the allegation that Sgt. Shepherd contacted either an unknown clinic worker or Sgt. Julian. Even if Sgt. Shepherd did contact either or both of these individuals, the record does not show that Sgt. Shepherd relied on anything other than Officer McCracken's testimony when finding Petitioner guilty of the alleged charge. Therefore, Sgt. Shepherd cannot be deemed to have participated in the "investigation" and so was not required by TDOC policy to recuse himself.

Petitioner's fourth issue is his claim that the Trial Court erred in holding that there was sufficient proof to support a finding of guilt by a preponderance of the evidence. Officer McCracken's testimony that he searched Petitioner's pants and found a pill that he later identified as a morphine pill was sufficient evidence, if believed, to support the finding of guilt. At the hearing, Petitioner testified that the pill was not his and, if a morphine or other illegal pill was found in his pants, then he was "framed." The issue of whether there was sufficient evidence to support a finding of guilt in this case involves purely a credibility determination made by Sgt. Shepherd at the hearing. However, as this Court in *Ross* correctly noted:

The reviewing court does not weigh the evidence, but must uphold the lower tribunal's decision if the lower tribunal "acted within its jurisdiction, did not act illegally or arbitrarily or fraudulently, *and if there is any material evidence to support the [tribunal's] findings.*" *Jackson*, 2006 WL 1547859, at \*3 (citing *Watts v. Civil Serv. Bd. of Columbia*, 606 S.W.2d 274, 276-77 (Tenn. 1980); *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983)).

*Ross*, 2008 WL 4756873, at \*2 (emphasis added).

Officer McCracken's testimony is, at the very least, material evidence to support the decision of the hearing officer. Petitioner is asking this Court to re-weigh the evidence in his favor. This we cannot do. Because there was material evidence to support the decision of the lower tribunal, and because that tribunal acted within its jurisdiction and did not act illegally, arbitrarily or fraudulently, we find against the Petitioner on this issue as well.

Petitioner's final issue is his claim that the record on appeal is incomplete because the photograph of the pill is not included in the record. Apparently, the photograph was inadvertently lost or destroyed after the hearing. Petitioner claims that the disappearance of the photograph is evidence that "the defendants are attempting to conceal the truth in this case." We have already held that the alleged poor quality of the photograph was not sufficient to overturn the

finding of guilt in light of Officer McCracken's testimony. If the quality of the photograph was as poor as Petitioner claims, then having it in the record on appeal would be of little or no value. Therefore, we refuse to overturn the finding of guilt simply because we are unable to look at a photograph which, according to Petitioner, is of such poor quality we would not be able to tell what it is anyway.

### **Conclusion**

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court solely for collection of the costs below. Costs on appeal are taxed to the Appellant, Harold V. Smith and his surety, if any, for which execution may issue if necessary.

---

D. MICHAEL SWINEY, JUDGE